IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, Bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY, *Respondents.*

CERTIORARI.

BRIEF AND ARGUMENT.

The legal questions relating to the appeal from the District Court to the Circuit Court of Appeals have been discussed in the brief and reply brief filed by respondents in support of their motion to quash the writ of *certiorari,* which is to be heard and considered with the hearing upon the merits, and will not be repeated in this brief and argument. The facts of the case are also set forth in substance in the opinion of the Circuit Court of Appeals, made a part of the record herein, and no further allusion will be made thereto, except such as may be necessary in presenting the argument.

BRIEF.

I.

ILLINOIS LAW ABHORS SECRET LIENS. THE LAW AND THE POLICY OF THE DECISIONS OF ILLINOIS, UNDER ITS CHATTEL MORTGAGE LAW AND ITS RULES AS TO PLEDGES, IN ALL CASES OF SECURITY, ARE EXCEEDINGLY STRONG AND POSITIVE.

Murch v. *Wright*, 46 Ill., 487.
Union Trust Co. v. *Trumbull*, 137 Ill., 146.
Borden v. *Croak*, 131 Ill., 68 (74).
Chickering v. *Bastress*, 130 Ill., 206.
Snydaker v. *Blatchley*, 177 Ill., 506.
Elliot v. *Piano Co.*, 80 Ill. App., 51.
Harvey v. *R. I. Locomotive Works*, 93 U. S., 664.
Deering & Co. v. *Washburn*, 141 Ill., 143.
Peoria Mfg. Co. v. *Lyons*, 153 Ill., 435.
Barnet v. *Fergus*, 51 Ill., 352.
Long v. *Cockern*, 128 Ill., 29 (36).
Fifield v. *Farmers Nat'l Bank*, 148 Ill., 163.
Huschle v. *Morris*, 131 Ill., 587.
Kitchell v. *Bratton*, 1 Scam., 300 (303).
Funk v. *Staats*, 24 Ill., 632 (645).
Johnson v. *Halloway*, 82 Ill., 334 (336).
Ticknor v. *McClelland*, 84 Ill., 471.

II.

THE BANKRUPT CONTINUING IN THE ACTUAL POSSESSION OF THE PREMISES AND CARRYING ON HIS BUSINESS THEREIN, AND THE STORAGE COMPANY HAVING NO VALID POSSESSION, THE SO-CALLED RECEIPTS, CALLED WARRANTS OR WAREHOUSE RECEIPTS, ISSUED BY THE STORGE COMPANY, WERE INEFFECTUAL TO TRANSFER PROPERTY LOCATED IN SAID PREMISES.

Union Trust Co. v. *Trumbull, supra.*

Adams, Assignee, v. *Merchants Nat'l Bank,* 2 Fed., 174 (9 Biss., 396).

Geilfus v. *Corrigan,* 95 Wis., 651.

Nash v. *Page,* 80 Ky., 539.

Franklin Nat. Bank v. *Whitehead,* 149 Ind., 560.

Bucher v. *Commonwealth,* 103 Pa. St., 529.

Casey v. *Cavaroc,* 96 U. S., 467.

Ticknor v. *McClelland, supra.*

Canadian Bank v. *McCrea,* 106 Ill., 281.

III.

(a) BY SECTION 67A, WHICH PROVIDES THAT "CLAIMS WHICH FOR WANT OF RECORD OR FOR OTHER REASONS WOULD NOT HAVE BEEN VALID LIENS AS AGAINST THE CLAIMS OF THE CREDITORS OF THE BANKRUPT SHALL NOT BE LIENS AGAINST HIS ESTATE," ALL CLAIMS VOIDABLE FOR LEGAL, IF NOT ACTUAL, FRAUD ARE VOID AGAINST THE TRUSTEE IN BANKRUPTCY.

In re Pekin Plow Co., 112 Fed., 308 (Cir. Ct. Appeals, Eighth Cir.).

Chesapeake Shoe Co. v. *Seldner,* 122 Fed., 593 (Cir. Ct. Appeals, Fourth Cir.).

In re Smith & Shuck, 132 Fed., 301 (Dist. Ct. Nor. D. Io.).

In re Dunn Hardw. & Furniture Co., 132 Fed., 719 (Dist. Ct. E. D. N. Car.).

In re Thorp, 130 Fed., 371 (Dist. Ct. E. D. Va.).

Davis v. *Turner,* 121 Fed., 605 (613), (Cir. Ct. Appeals, Fourth Cir.).

In re Galt, 121 Fed., 443 (Dist. Ct. Nor. Dist., Ill.).

In re Andrea Co., 117 Fed., 561 (Dist. Ct. E. D. Wis.).

In re Fraizer, 117 Fed., 746 (Dist. Ct. W. D. Mo.).

In re Jones, 116 Fed., 431 (Dist. Ct. E. D. N. Car.).

In re Booth, 98 Fed., 975 (Dist. Ct. Or.).

Stroud v. *McDaniel,* 106 Fed., 493 (Cir. Ct. Appeals, Fourth Cir.).

In re Ronk, 111 Fed., 154 (Dist. Ct. Ind.).

In re Leigh, 96 Fed., 806 (Dist. Ct. Col.).

(b) SECTION 70A (5) OF THE PRESENT BANKRUPTCY ACT, "THE TRUSTEE * * * SHALL * * * BE VESTED BY OPERATION OF LAW WITH THE TITLE OF THE BANKRUPT * * * TO ALL * * * PROPERTY WHICH PRIOR TO THE FILING OF THE PETITION HE COULD BY ANY MEANS HAVE TRANSFERRED, OR WHICH MIGHT HAVE BEEN LEVIED UPON AND SOLD UNDER JUDICIAL PROCESS AGAINST HIM," IS NOT SIMPLY A DESCRIPTION OF KINDS OF PROPERTY, BUT IS ALSO A STATEMENT OF THE EXTENT TO WHICH TITLE IS TAKEN BY THE TRUSTEE.

Hewit v. *Berlin Machine Works,* 194 U. S., 296.

In re Pekin Plow Co., *supra.*

Chesapeake Shoe Co. v. *Seldner, supra.*

Ie re Garcewich, 115 Fed., 87 (Cir. Ct. Appeals, Second Cir.).

In re Kellogg, 118 Fed., 1017 (Cir. Ct. Appeals, Second Cir.).

In re Smith & Shuck, *supra.*

In re Tweed, 131 Fed., 355 (Dist. Ct., N. D. Ia., C. D.).

In re Butterick, 131 Fed., 371 (Dist. Ct. M. Dist. Pa.).

In re Carpenter, 125 Fed., 831 (Dist. Ct., West Dist., N. Y.).

In re Rabeneau, 118 Fed., 471 (478), (Dist. Ct. West. D. Mo.).

In re Andrae Co., *supra.*

In re Fraizer, *supra.*

In re Legg, 96 Fed., 326 (Dist. Ct. Conn.).

In re Hull, 115 Fed., 858 (Dist. Ct. Vt.).

(c) BANKRUPTCY PROCEEDINGS, VOLUNTARY OR INVOLUNTARY, ARE IN EFFECT A SUIT BY ALL THE GENERAL CREDITORS OF A BANKRUPT, AND AN EFFECTUAL SEIZURE AND SEQUESTRATION OF THE PROPERTY OF THE BANKRUPT, FOR THE BENEFIT OF SUCH CREDITORS. BY SUCH PROCEEDINGS, THE CREDITORS ARE USING THE COURTS OF LAW AND THEIR PROCESS FOR THE COLLECTION OF THEIR DEBTS.

In re Pekin Plow Co., *supra.*

In re Fraizer, *supra.*

In re Smith & Shuck, *supra.*

Chesapeake Shoe Co. v. *Seldner, supra.*

Adams, Assignee, v. *Merchants National Bank,* 2 Fed., 174 (9 Biss., 396).

(d) THE FOLLOWING CASES CONCERN 67A OR 70A, OR BOTH, AND SHOW THAT THE TRUSTEE STANDS AS ARMED WITH AN EXECUTION.

Spencer v. *Duplan Silk Co., supra.*
Duplan Silk Co. v. *Spencer, supra.*
In re Legg, *supra.*
Fisher v. *Cushman, supra.*

IV.

AN EQUITABLE LIEN, GOOD BETWEEN PARTIES, MUST NEVERTHELESS BE A VALID, SUBSISTING LIEN, TO BE GOOD AGAINST A TRUSTEE. AGREEMENTS FOR MORTGAGES OR PLEDGES, EXECUTORY CONTRACTS TO LIKE EFFECT, PROMISES OF SECURITY OR PLEDGES, AND MERE CONFIDENCES REPOSED BY THE CREDITOR IN THE DEBTOR, LOOKING TO LIENS OR SECURITY, ARE OF NO VALIDITY AGAINST THE GENERAL CREDITORS REPRESENTED BY THE TRUSTEE OF THE BANKRUPT ESTATE. AN EQUITABLE LIEN, TO BE GOOD AGAINST THE TRUSTEE IN BANKRUPTCY, MUST BE ONE THAT WOULD BE GOOD AGAINST AN EXECUTION.

In re Klingaman, 101 Fed. Rep., 691 (So. District of Iowa, E. Div.).

See also:

Casey v. *Cavaroc, supra.*
Story-on Bailments, Sec. 297.
In re Richards, 96 Fed., 937.
Stelling v. *G. W. Jones Lumber Co.*, 116 Fed., 261.

See also:

In re Ronk, *supra.*
Spencer v. *Duplan Silk Co., supra.*
In re Booth, *supra.*
Snydaker v. *Blatchley,* 177 Ill., 506.

V.

IF THE APPEAL WAS TECHNICALLY IMPROPER, THE CIRCUIT COURT OF APPEALS COULD TREAT THE SAME AS A PETITION FOR REVIEW, AND, SO TREATED, THE DECISION RENDERED THEREIN BY THE CIRCUIT COURT OF APPEALS WAS JUSTIFIED AND WAS THE ONLY DECISION THAT COULD PROPERLY BE RENDERED.

In re Richards, 96 Fed., 935 (Seventh Circuit).
In re Abraham, 93 Fed., 767 (Fifth Circuit).
Chesapeake Shoe Co. v. *Seldner,* 122 Fed., 593 (Fourth Circuit).

ARGUMENT.

I.

AS TO THE LAW AND POLICY OF ILLINOIS RELATING TO SECRET LIENS.

The policy of the law of Illinois is decidedly averse to any sort of secret lien, without regard to the form adopted. The sale of goods with the reservation of title in the vendor until the purchase money is paid, a chattel mortgage on a stock of goods which permits the mortgagor to carry on his usual trade as to such stock, the ordinary lease of sewing machines, and transactions of that character, are declared fraudulent *per se* by the laws of that state. The policy of that law is already familiar to this court, as is indicated by its decision in the case of *Hervey* v. *R. I. Locomotive Works,* 93 U. S., 664. In that case this court says:

> "Secret liens, which treat the vendor of personal property, who has delivered possession of it to a purchaser, as the owner until the payment of the purchase money, cannot be maintained in Illinois. They are to be held constructively fraudulent as to creditors. * * * The plaintiff cannot complain, as the laws of Illinois pointed out a way to preserve and protect his lien."

There are only two ways, under the laws of Illinois, in which a valid lien upon personal property may be given; first, by chattel mortgage, properly recorded; second, by pledge, in which the actual and physical possession of the property is delivered to the pledgee, or to

some one for him. The policy of the Illinois law is quite fully discussed in the case of the *Union Trust Company* v. *Trumbull,* 137 Ill., 146. We shall discuss that case in its bearings upon the case at bar a little more fully hereafter, but under the present heading we desire to make two brief quotations.

On page 180 of the opinion we find the following statement:

> "There is no mode under our law, except by chattel mortgage duly acknowledged and recorded, by which the owners of personal property retaining its possession can give another a lien upon it that can be enforced as against creditors and subsequent purchasers."

Again, on page 173 of the opinion we find the following statement:

> "To the existence of a pledge, the possession, either actual or symbolical, by the pledgee, of the personal property which is the subject of the pledge, is absolutely essential. Ordinarily, actual and physical possession of the property is delivered to and retained by the pledgee; but where the actual delivery is to a carrier or warehouseman, and a bill of lading or warehouse receipt is given therefor, the assignment or transfer of such bill of lading, or indorsement of such warehouse receipt, with delivery thereof to the pledgee, is regarded in law as the delivery of possession to the pledgee of the property which the instrument represents, the bill of lading or receipt standing in the place of the property of which it is the symbol. (*Taylor* v. *Turner,* 87 Ill., 296; *Michigan Central Railroad Co.* v. *Phillips et al.,* 60 *id.,* 190; *Burton* v. *Curyea,* 40 *id.,* 320; *Canadian Bank* v. *McCrea et al.,* 106 *id.,* 281.) But it is a necessary condition to the existence of such symbolical possession by the pledgee that the property itself is in the possession of some person or corporation other than the pledgor. Here the endorse-

ments and transfers of the supposed warehouse receipts to the receipt holders were ineffectual to constitute them valid and legal pledges of the wool to secure the debts for which they were hypothecated, and this, both because the National Storage Company did not have possession and control of the wool, and because the wool mentioned in each receipt was not so set apart and distinguished from other wool as that it could have been found and identified by the receipt. The storage company was not, under the law, authorized to issue warehouse receipts."

We also refer the court to the following cases:

Barnet v. *Fergus*, 51 Ill., 352.
Murch v. *Wright*, 46 Ill., 487.
Deering & Co. v. *Washburn*, 141 Ill., 153.
Peoria Mfg. Co. v. *Lyons*, 153 Ill., 435.

The referee, in his report, made this remarkable statement: "The bankrupt desired to borrow money on, or to sell his merchandise. To accomplish it by way of issuing receipts thereon was more convenient than any other way, and, if it was in compliance with the Illinois statute, enabled him by assigning the receipt to transfer the property represented by such receipt. To have taken the seed to some public warehouse and there stored it, and then issued receipts would have been expensive."

The *Union Trust Company* case says that the issuance of warrants under such circumstances is not in compliance with the law. Many creditors and debtors have found it more convenient not to have chattel mortgages recorded, but the law gives little respect to the good faith of such acts. The referee also said, "the storage people were lawfully in possession in the manner herein stated" (that is, they had a so-called lease without delivery of

possession thereunder, and a custodian made occasional trips to the premises, who, according to his story, never discovered that Rodgers was handling the seed under the storage warrants as freely as he handled any seed), "and the bankrupt's possession was subordinate thereto, and not in derogation or opposition to that of the storage people. The bankrupt was there by suffrance, under the storage people." This will not do where there is the relation of debtor and creditor, and never has been allowed. When a mortgagee who does not record his mortgage, permits the mortgagor to continue in possession, the mortgagor may remain in possession at the suffrance of the mortgagee in a certain sense, but in no sense that will aid the mortgage. So as to pledges.

Wherever a security is held to be in the nature of a mortgage, it is to be governed by the rules of law applicable to chattel mortgages.

Borden v. *Croak*, 131 Ill., 68 (74).

Thus conditional sales are held to be within the provisions of the chattel mortgage law, and where there is an instrument not acknowledged and recorded as required by the chattel mortgage act, the same, though valid between the parties, is invalid against judgment creditors and purchasers.

Chickering v. *Bastress*, 130 Ill., 206.
Snydacker v. *Blatchley*, 177 Ill., 506.
Elliott v. *Piano Co.*, 80 Ill. App., 51.

Notice to third parties, whether levying executions or attachments, or purchasing, is immaterial. In Illinois a third party against whom an incomplete chattel mortgage is not good may be a purchaser with full notice of all equities, and he may buy for a past consideration.

Long v. *Cockern*, 128 Ill., 29 (36).

The policy of Illinois law is effective and positive against all secret liens, which are held fraudulent in law, though there may be no fraud in fact.

Fifield v. *Farmers National Bank,* 148 Ill., 163.
Chickering v *Bastress, supra.*

This policy of the law and decisions of Illionis courts against secret liens would be effectually destroyed, if an arrangement such as that which was carried out between the bankrupt and the storage company is sufficient to enable a debtor to pledge his property as security. The chattel mortgage law and its strength is gone, and the rule that possession is the essence of a pledge is a fiction, if parties, desiring to reserve liens in conditional sales, or sales on the installment plan, or to give security upon property in their own homes or in their own places of business, may accomplish such end simply by giving a formal lease of their premises or a portion thereof to a so-called storage company, and then having the storage company issue a so-called warrant and place a tag on the property.

The case of *Union Trust Co.* v. *Trumbull,* 137 Ill., 146, decides that the lien claimed in that case under the storage company warrants would have been invalid against execution or attachment creditors.

There is in Illinois a line of well recognized authority holding that where mortgagor (or pledgor) is permitted to hold and sell in the course of trade, by the consent, express or implied, of the mortgagor, the mortgage or security is fraudulent as against third parties; and such fraud is held to be fraud in law or fraud *per se.*

Huschle v. *Morris,* 131 Ill., 587.
Chickering v. *Bastress,* 130 Ill., 206.

Fraud in law or fraud *per se* is not rebuttable in Illinois.

Kitchell v. *Bratton*, 1 Scam., 300 (303).
Funk v. *Staats*, 24 Ill, 632 (645)
Johnson v. *Halloway*, 82 Ill., 334 (336).
Ticknor v. *McClelland*, 84 Ill., 471.

II.

THE SO-CALLED WAREHOUSE RECEIPTS OR STORAGE WARRANTS WERE INEFFECTUAL TO TRANSFER PROPERTY.

Union Trust Co. v. *Trumbull*, 137 Ill., 146.
Adams, Assignee v. *Merchants National Bank*, 2 Fed., 174 (9 Biss., 396).

The storage company, by the terms of its charter, could issue warrants only on property "deposited or intended to be deposited with said corporation," and when such property and merchandise "have been received, are on the premises or under the control of the said corporation at the time of issuing such receipts." Moreover, the Constitution of Illinois, and the sections of the statute relating to warehouses, plainly contemplate that such storage shall be carried on only by a person or company that has a warehouse in fact, and stores the property in fact; that has the property under its actual control and in its actual possession; and that carries on the storage business for a compensation.

Constitution, Art. 13, Sec. 1, Statutes, Ch. 114, Secs. 2, 3, 9.

It is only such warehouse receipts, made in compliance with law, that are made negotiable.

Statutes, Ch., 114, Sec. 24.

The so-called lease from the bankrupt to the storage company was ineffectual for the above purposes.

Union Trust Co. v. *Trumbull, supra.*

The law also contemplates a real transaction in the storage business, for which the storage company is to receive a compensation for storage as such. The property remained in the premises of the bankrupt under his own possession and control. The warrants were formal affairs, made upon alleged inspection by a so-called inspector of the storage company by occasional trips to the warehouse of the bankrupt, the bankrupt always retaining the keys of said premises. The bankrupt, under said circumstances, in reality paid, not for storage, but only for issuance of warrants, which is not the payment of storage, nor the issuance of warrants under the law.

The National Storage Company, not having complied with the law as to having a warehouse where the seed was located, issued no warrants for said seed in compliance with the law. The so-called lease was ineffectual to give validity to the warrants.

Union Trust Co. v. *Trumbull, supra.*

The transactions and dealings between the bankrupt and the storage company were such as show that both the storage company and the bankrupt never intended or expected the company to take actual possession and to do an actual storage business in the premises.

Bouvier's Law Dictionary defines a warehouseman as "a person who receives goods and merchandise to be stored in his warehouse for hire," and it defines warehouse receipts as "receipts given by a warehouseman for chattels placed in his possession for storage purposes."

Anderson's Law Dictionary defines a warehouseman to

be "a person whose business is to receive and store merchandise for a compensation; a public warehouseman assumes an obligation to the entire public." And with reference to receipts, it says "if a receipt is a warehouse receipt, it is negotiable, but unless it is in fact such, no form can make it such."

What is a warehouseman, and what is a warehouse receipt and its legal effect, are so well defined and known in their legal and commercial significance that any discussion and extended citation of authority appears to be uncalled for. The warehouseman must be engaged in the *business* of warehousing, he must have his warehouse or place under his own control where he stores goods, and he must engage in the business for a compensation. A certain degree of *publicity* in the business is required in order that the storage receipt may have in law power to represent symbolically the property. Without this degree of actual business and publicity, the mere form of a receipt has no more force than any formal papers of the same character made out and passed between persons making no pretense to warehousing.

And as showing that such warehouseman must openly engage in a business of warehousing, and for a compensation as such, see:

Geilfus v. *Corrigan*, 95 Wis., 651.
Nash v. *Page*, 80 Ky., 539.
Franklin Nat. Bank v. *Whitehead*, 149 Ind., 560.
Bucher v. *Commonwealth*, 103 Pa. St., 529.
Adams, Assignee, v. *Merchants' Nat. Bank*, *supra*.

As stated by Anderson, quoted above, the warehouse receipt must be one in fact in order to render it negotiable. The facts that exist are what give force to the receipts, and the want of proper facts equally destroys such force in the receipts. The difference between actual warehousing and that kind attempted to be carried on by the National Storage Company is, that one is warehousing and the other is not. The storage company had no warehouse of its own, and the paper lease, did not give it any possession. It had no keys, but the bankrupt always had and kept the keys, and access to the premises was obtainable only through him. The few signs placed upon the inner walls of the building were obscured by dust and were not readily observable because of the piles of seed upon the floors. These piles were in car-lots, consisting of about 250 bags each, and were from six to seven feet high. It does not appear that the storage company and Rodgers, the bankrupt, ever intended that there should be a real storage or warehouse business done by the company. The "proposal for warehousing," signed by Rodgers with the storage company, and pursuant to which he made arrangements for what was done, and gave the lease, itself appears to assume that the main thing to be done by the storage company was to issue storage warrants. The language is "the National Storage Company hereby proposes to issue its storage warrants to the order of yourself or to such order as the acceptor hereof may hereafter direct, upon personal property * * * to be stored in the premises," etc. And "all of the above-named premises, or such portions thereof as may from time to time be required shall, as and when required, be leased to the National Storage Company." The full understanding was that Rogers was to

retain possession of his premises. The rates of storage were not to be commensurate with the bulk and size of the property and the expenses of handling and keeping, but were simply a percentage upon the value. "All traveling expenses and other incidental expenditures incurred while conducting the business under this proposal and all costs of placing property in store," etc., were to be added to the charges, but all handling of the property, placing it in store, and taking it out, was to be done by Rodgers. (Rec., 128.)

The lease was made for a nominal consideration of "a yearly rental of one dollar and other good and valuable consideration, the receipt of which, in advance, is hereby acknowledged." (Rec., 132.)

The warrants themselves recited that "it is agreed that this company is not responsible for loss or damage to property occasioned by fire, water, leakage, vermin, ratage, shrinkage, accidental or providential causes," etc. (Rec., 155.) In a word, by the various arrangements between the parties, no warehousing was ever intended to be done. Simply a form was to be gone through.

The petitioners claim that this is a warehousing business that has grown up by the commercial necessities of the times. But Rodgers did not have any need of storage. He had his own premises. He had all the room there was that the storage company expected to have. He did not need storage for the care of his seed and property, nor for the purposes of delivering the same, for he had all such storage room he desired and he had all facilities for delivery. Run down to its basis, it is found that the only thing wanted was to avoid the notoriety, or injury to credit, that would arise from complying with the law of the state in giving lawful

security upon his property for advances. He did not wish to surrender the possession of his property, nor did he wish to file chattel mortgages. This was the sole motive of the whole arrangement. Instead of being called a storage business or a warehouse business, the scheme, having no legal or legitimate feature to it, may far better be termed a bureau for the creation of collaterals for the use of debtors.

As to the authorities cited by the petitioners, to show that property may be delivered by storage warrants under any circumstances approaching those that we find in the instant case, it may be said in general that they fall under two classes. First, cases where, though there may have been some lease, force and effect was given to the transaction by the fact that an actual agent or custodian took full or sufficient and exclusive possession of the property or premises, such as to render the transfer good; and second, where pledges were upheld, it was because of a like possession taken on behalf of the storage company. This will be found true of all of the cases cited. In a few instances, particular laws of the state where the property was situated controlled.

Thus in the case of *Hatch* v. *Oil Co.*, 100 U. S., 124, there was actual delivery of the property. In *Sumner* v. *Hamlet*, 12 Pick., 76, a special agent took such possession and control of the property as to answer for all purposes. In the *Bank of Rome* v. *Haselton*, 83 Tenn., 216, the party who issued the warehouse receipt was a regular warehouseman, which tended to simplify the case. He had a warehouse of his own, but lacking room, leased the warehouse belonging to the Iron Company, and it fairly appears from the record of the case that he was the sole and exclusive occupant. His possession was not

concealed, his clerk carried the key, and he appeared to have the control of the property.

The case of *Fidelity Co.* v. *Roanoke Iron Co.*, 81 Fed., 439, was not a case of warehousing or warehouse receipts, but of a pledge of ponderous property located in an open yard upon which was placed a conspicuous sign indicating that it was a yard of the pledgee. There may be cases where pig iron and heavy property, that is almost as immovable as a mountain, may without question be delivered by being pointed out, and certainly where it is stored and set apart and marked, but such cases are a clear exception to all others. The law is much more liberal as to the constructive delivery of bulky property than as to property which may easily be moved. But the rule is against relaxation.

The bankrupt continued in full possession and control of his property. The storage company did not intend to take any possession. It did nothing in that way. The flying trips made once or twice a week or when there was occasion by the so-called inspector of the storage company amount to nothing. The lease amounts to nothing in the way of delivery of the possession, any more than it did in the *Union Trust Company* case, *supra*. Here, as there, as said by the court, the lease was probably only to enable the storage company to say it had a warehouse, but the court said that it had none. The placing of tags on the piles of seed the bankrupt was shipping out and delivering to various parties in the country was nothing. These tags were small affairs and not different in outward appearance from ordinary tags used in the ordinary course of business, and other tags were on the bags. The bankrupt frequently sold seed and shipped it to different parts of the country and substituted other piles

of seed in its place. All these piles were in car-load lots of 250 bags each, piled on the wide open floors about 60 x 100 feet in size, in the six-story and basement building used by the bankrupt.

The storage company permitted Rodgers to exercise the same authority and control over the property, that he did before the receipts were issued. On this point the testimony of Mr. Rodgers is uncontroverted. After discussing his premises and his method of handling and selling seed, etc., he stated as follows (Rec., 216):

> "I have used those premises all the time in the way that I have described, ever since I have been there. Have used the premises since August 1, 1900 (date of storage company's lease), in just the same way. There has been no change whatever in the way I handled it. I used the premises just the same all the time since I have had them."

The alleged possession of the storage company was a fiction pure and simple. In the language of the opinion of the Court of Appeals, the bankrupt

> "remained in possession of the premises as before the agreement, continuing to transact his business there as he had formerly done. There were certain signs placed upon the different floors of the building, indicating that the storage company controlled the premises. These were small and obscure signs, not likely to attract attention, and most of them hidden behind the piles of bags of seed. No sign was displayed upon the exterior of the building indicating any proprietorship of the storage company, or giving notice to the world that any other than the bankrupt had possession and control. There was no open, notorious manifestation of a change of possession, none was intended, and there was none in fact. Upon each pile of bags of seed for which the warehouse receipts or warrants were issued, there was placed a small tag, which might be discovered upon careful search. The bankrupt substantially treated the

> property as his own; at times going through the forms prescribed by the storage company; and whenever he found it necessary, ignoring them."

The process by which the referee reached his conclusion, is fully set forth in the report which the District Court approved in its decree. In this report (Rec., 31) he says: (Italics ours.)

> "Upon the execution of the lease, the National Storage Company proceeded to take possession of the premises leased by it from the bankrupt *by tacking on the walls of the several floors notices, each being made of enameled tin, about three by seven inches in size, with white letters on dark blue ground, said signs being eight in number, and distributed on the several floors and containing the following: 'This property controlled by the National Storage Company, as public warehouse, warehouse premises No. 281.' Said signs were placed some seven or eight feet from the floor on the side of the building and on the partitions between the premises in question and the electric company. No signs were placed on the outside of the building.*"

Then, after referring to the small card signs, four by six inches in size, placed on the different lots of bags, the referee concludes (Rec., 41):

> "I think the lease made by it (the storage company) by the bankrupt, and the possession thereunder, *as herein set forth*, was sufficient for the purpose of accomplishing the end desired, namely, to be sufficient to entitle the storage company to the possession of the premises, and its possession was thereby sufficient to entitle it to issue receipts on property placed in its custody."

The very life and essence of a pledge being delivery to and possession in the pledgee, and the chattel mortgage act of Illinois (Chapter 95, Section 1), providing only one method where the possession may

be retained by the debtor in the case of a chattel mortgage or conveyance *"having the effect* of a mortgage *or lien,"* and that method being that an instrument must be made, acknowledged and recorded, wherein is an express provision that the grantor retains possession, and that without such provision, acknowledgment and recording, the conveyance shall not be valid "unless possession thereof be delivered to and remain with the grantee"—all this being true, whenever an arrangement runs counter to the policy of the chattel mortgage law, and the kindred rules as to the pledges, it will be invalid as against third persons, whether the arrangement is sufficient to be called a chattel mortgage or not. No symbolical delivery will be sufficient in cases of security, in Illinois, at least, where the control of the personal property continues with the debtor, no matter how bulky the property or how great the inconvenience of removal. No debtor can be constituted the agent or bailee of the secured party, to hold the property. Herein is the distinction from sales, where the vendor may, under proper conditions, be bailee of the vendee.

In this connection we desire to make a somewhat lengthy quotation from the opinion of this court in the case of *Casey, Receiver,* v. *Cavaroc et al.,* 96 U. S., 467:

> "Dalloz says: 'It is evident that if the pledge of movables could, without a delivery, have effect in regard to third persons, it would be the source of great frauds and deceptions. When the debtor is obliged to surrender possession, he cannot deceive third parties dealing with him by keeping possession of the pledged articles as part of his estate, and getting credit thereby.' He takes special notice of the decision that a pledge is not valid if the dispossession of the debtor is not sufficiently complete to prevent substitution; or if there is a mere contract

for a pledge, and not an actual pledge." * * *

"The Credit Mobilier claims a privilege by virtue of a pledge; and such a privilege, as we have seen, cannot be maintained as to third persons, without possession. Bad faith, it is true, would defeat the pledge, though the creditor had possession. But want of possession is equally fatal, though the parties may have acted in good faith. Both are necessary to constitute a good pledge so as to raise a privilege against third persons. The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods.

"This consideration meets the objection which is urged against the rule, that it would result in giving to the general creditors the benefit of the advances made to the debtor on the faith of the stipulated pledge, inasmuch as the estate is increased to the extent of these advances. It is true that the estate is so increased; but the debts and liabilities are also increased to the same amount by the demand of the party who makes the advances; the only effect of the rule being, that the latter comes into concurrence with the other creditors on an equality, and not by way of preference; and if the latter derive any benefit from this result, it must be remembered that, in view of the law, they might not have given credit to the common debtor had he not remained in possession of the goods, and appeared to continue as the absolute owner thereof. If the pledge should be sustained, they would have good cause to complain that they had been deceived by the acts of the parties setting up the pledge. So that, on the question of relative merit and demerit, the parties are in all respects equal. It is on this principle that the law is founded."

The case of *Canadian Bank of Commerce* v. *McCrea*, 106 Ill., 281, expressly holds that a warehouse receipt issued in accordance with the Statutes of Illinois is not a negotiable instrument in the sense that bills of ex-

change and promissory notes are negotiable, and the court in that case quotes fully from the opinion of this court in *Shaw* v. *Railroad Co.*, 101 U. S., 557. It further holds, in substance, that the possession of the receipt is no more than evidence of the possession of the property itself. If, therefore, by the greatest latitude, it should be held that the receipt holders in this case at any time ever had the possession of the property by virtue of these receipts, the fact, that the bankrupt thereafter, and at the time of the failure, with their knowledge, or without their knowledge, had to the rest of the world apparent possession, and had power to make substitutions, would defeat their title.

III.

THE PROTECTION OF GENERAL CREDITORS UNDER THE PRESENT BANKRUPTCY ACT.

By section 67a of the present Bankruptcy Act, which provides that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate," all claims voidable for legal, if not for actual, fraud against creditors of the bankrupt are void against his estate. By record, such notice is given as to certain claims that they are rendered valid against creditors. The words "for other reasons" refer to similar matters such as want of possession in the case of a pledge, or in the case of a chattel mortgage unrecorded, or in the case of conditional sales—such as fail to accomplish the end, notice. The words may refer also to actual fraud, but they certainly must include reasons which make what is done fall short of accomplishing

the same end that record would accomplish. Other paragraphs of section 67 provide for the subrogation of the trustee to the rights of a creditor who has some judgment or other lien which he is prevented from enforcing by reason of the bankruptcy proceedings, for the dissolution of liens created or obtained within four months in any suit, etc., for the setting aside of conveyances, etc., made with intent of fraud upon the bankruptcy act or upon creditors, and for the preservation of liens made in good faith for a present consideration, which have been recorded according to law if record was necessary in order to impart notice.

But, in view of all these other provisions, the general meaning above urged for 67a is necessary in order to render 67a of any force.

At one time, certain District Courts gave a narrower interpretation to 67a, substantially holding that only claims which some creditor could set aside, by virtue of legal process actually existing and the like, or for actual fraud, could be avoided by the trustee; but this view wholly did away with all force to 67a, for those matters were provided for in other paragraphs and sections of the act.

Section 70a (5) of the present Bankruptcy Act, which provides that the "trustee * * * shall * * * be vested by operation of law with the title of the bankrupt * * * to all * * * property, which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon or sold under judicial process under him," is not only a description of kinds of property, but a statement of the *extent* to which title in all kinds of property is taken by the trustee. The language used is entirely different from a mere description.

If an enumeration of kinds of property was meant, the language would be descriptive or in the form of enumeration, as "property real and personal, choses in action, debts, demands," etc., as was used in prior acts. This view gives force and effect to section 70a(5) that is commensurate with and consistent with 67a. The spirit of the law is found in the letter of the law. That which the bankrupt has and can convey, that title he has to pass to his trustee. To the extent his title can be seized or sold by judicial process against him, to that extent he has interest and title. It is his title before the world that is to be taken and used for the benefit of all creditors upon the institution of bankruptcy proceedings, which proceedings abruptly terminate all control of the bankrupt over his property and all his business. The title which innocent purchasers, or, in Illinois, purchasers in fact, or execution or attachment creditors could have obtained from him is the title that passes to the trustee and there can be no question but that under the law of Illinois, that means a title divested of any sort of secret lien.

By force of sections 67 and 70, as well as by consistent provisions elsewhere in the bankruptcy act, bankruptcy proceedings, voluntary or involuntary, are in effect a suit by all the general creditors of the bankrupt and an effectual seizure and sequestration of the property of the bankrupt for the benefit of such creditors. By such proceedings, the creditors are using the courts of law and their process for the collection of their debts.

It is pointed out in numerous decisions that 67a and 70a(5), as well as a number of other paragraphs, were not found in the bankruptcy act of 1867, nor in any prior acts. Congress certainly manifested an intention by all of these provisions to take a positive step in ad-

vance of that afforded in the older bankruptcy acts in the direction of protecting general creditors. In a few decisions of the courts these provisions appear to be without much force, and questionable liens, and liens that fail because they do not comply with the law and amount to legal liens, are said to prevail as much under the present acts as under the old acts of bankruptcy. According to such decisions, congress introduced a great many changes in the present act without accomplishing anything.

These narrower views, such as *In re Howland*, 109 Fed., 869, *In re Elmira Steel Co.*, 109 Fed., 156 as well as *In re N. Y. Economical Printing Co.*, 110 Fed., 514, in some of its aspects, are cleared away by such decisions as *In re Garcewich*, 115 Fed., 87, of the Circuit Court of Appeals, Second Circuit, which cites the *N. Y. Economical Printing Co.* case and other cases, and brings out clearly a better and more necessary construction of the sections. There are many other cases, such as *In re Pekin Plow Co.*, 112 Fed., 308, Circuit Court of Appeals, Eighth Circuit, and a great number of District Court cases that maintain the same view.

In the case of *In re* Pekin Plow Co., *supra*, in the Circuit Court of Appeals, Eighth Circuit, the court, referring to Sections 67 and 70 of the Bankruptcy Act, says:

> "These and many other provisions of the act evince an unquestionable intent on the part of Congress to make all creditors of the bankrupt parties to the proceedings when once instituted. The effect of the institution of such proceedings is to forthwith sequester and appropriate all the property of the bankrupt to the payment of his debts *pro rata* and equally."
>
> * * * * *
>
> "From the foregoing provisions of the act, it, in

our opinion, clearly appears that the institution of the proceedings in bankruptcy amounts to an effectual sequestration for the benefit of all his creditors of all the property of the bankrupt, including property transferred by the bankrupt, before proceedings were instituted, in fraud of its creditors. By such a proceeding, the creditors are 'using the courts of law and their processes for the collection of their debts,' and the creditors thereby make an effectual seizure of the property of the bankrupt within the true meaning of the decisions of the Supreme Court of Nebraska hereinbefore referred to."

In the case of *Chesapeake Shoe Co.* v. *Seldner, supra,* the Circuit Court of Appeals for the Fourth Circuit says:

"If the 'title of the bankrupt,' in Section 70a, means title as between him and a consignor or vendor, this section of the act is not only utterly inconsistent with the entire spirit of the law, but the numerous decisions holding that the trustee in bankruptcy takes title to property sold to the bankrupt under unrecorded conditional contracts of sale must be held erroneous. The registry statutes of the states do not invalidate the title of the vendor by such a contract as between him and his vendee, but only as between the vendor and the creditors of the vendee. Quite aside from the violence done to the plain meaning of the words, 'title of the bankrupt * * * to property * * * which might have been levied upon and sold under judicial process against him,' Clause 4 of Section 70a would seem to make an end of the contention here set up. The trustee takes 'the title of the bankrupt * * * to * * * property transferred by him in fraud of his creditors.' If the words, 'title of the bankrupt,' do not mean title as between him and his creditors, the language above quoted is meaningless. As between the bankrupt and his fraudulent grantee, the bankrupt has no title (*Spencer* v. *Duplan Co.* (D. C.), 112 Fed., 638), and to give any effect, or even meaning, to Clause 4, we must construe the words 'title of the bankrupt' as meaning title as between the bankrupt and his creditors."

The interpretation and force given to the above provisions of the Bankruptcy Act is abundantly supported by the decisions in other Circuit Courts of Appeal as well as a large number of the District Courts in the cases cited by us under head III of the brief above.

Congress, by the present bankruptcy act, undertook to give general creditors a process of the courts into their hands through the trustee, that should enable them to enforce all their rights, *pro rata*, that they would have been at liberty to enforce by execution had bankruptcy proceedings not intervened. Hence, where parties would have had valid legal liens, had they complied with the law as to record or as to possession of property pledged and the like, for failure of such record or possession they are now cut off from such liens by the provisions of the present act. Indeed, in the Sixth Circuit, now the Seventh, under the old act of 1867, the adjudication of bankruptcy was equivalent to a judgment and a levy, and the assignee had the right of a judgment creditor in cases where a mortgage or a pledge was invalid in consequence of wanting any element requisite under the law or statute of the state.

Adams, Assignee v. *Merchants' National Bank*, 2 Fed., 174.

The petitioners, in their brief and argument, manifest some apprehension lest Congress should rest under some imputation of wrong in attempting to cut off "*bona fide* holders for value and without notice." If Congress has failed to accomplish anything by 67a and the unusual language of 70a (5), substantially different from the old law of 1867, it might well expect criticism. As well might we say that the same imputation of wrong should rest upon a legislature in providing that an execution

should cut off imperfect liens or the constructively fraudulent claims of other creditors of the judgment debtor, as to urge that Congress intended to wrong creditors having no better alleged liens than those that have been presented in the present case.

One may say generally that the trustee takes the title of the bankrupt, and that he takes it in the plight in which it is found. But it is manifest from the provisions of the bankruptcy act we have considered, as supported directly by the great array of authority of the District Courts and the Circuit Courts of Appeals, that the trustee in bankruptcy does not simply step into the shoes of the bankrupt as to his property, but that in important particulars he represents the general creditors; it appears that he is armed with process, as it were, that enables him effectually to enforce the rights of creditors, the same as if those creditors had brought suit, obtained judgment, and placed execution in an officer's hands.

IV.

AN EQUITABLE LIEN, GOOD BETWEEN PARTIES, MUST, NEVERTHELESS, BE A VALID, SUBSISTING LIEN, TO BE GOOD AGAINST A TRUSTEE. AGREEMENTS FOR MORTGAGES OR PLEDGES, EXECUTORY CONTRACTS, TO LIKE EFFECT, PROMISES OF SECURITY OR PLEDGES, AND MERE CONFIDENCES REPOSED BY THE CREDITOR IN THE DEBTOR, LOOKING TO LIENS OR SECURITY, ARE OF NO VALIDITY AGAINST THE GENERAL CREDITORS REPRESENTED BY THE TRUSTEE OF THE BANKRUPT ESTATE. AN EQUITABLE LIEN, TO BE GOOD AGAINST THE TRUSTEE IN BANKRUPTCY, MUST BE ONE THAT WOULD BE GOOD AGAINST AN EXECUTION.

In re Ronk, *Spencer* v. *Duplan Silk Co., in re* Booth, *Savin* v. *Camp, supra.*

In re Klingaman, 101 Fed. Rep., 691 (So. District of Iowa, E. Div., overrules 1 N. B. N. R., 296)

An equitable lien is a right to subject a particular fund or specific property to the satisfaction of a demand. It is a charge with respect to defined property; but it is not a present estate or interest in the property, nor a present subsisting lien upon it. It is neither a *jus in re* nor a *jus ad rem.* An action is required to make it such. It is in reality but a right of action to gain such interest.

Fetter on Equity, p. 227.

3 Pomeroy Eq. Jur., 1233, etc.

As before shown, such equitable liens are not recognized in Illinois as against the rights of execution or attachment creditors, or purchasers, with or without notice, prior to action brought to establish the lien.

Chattel mortgages defectively executed or unrecorded are good between the parties thereto at law. A promised chattel mortgage, left unexecuted, imperfect pledges unperfected for want of delivery of the property, and conditional sales of personalty, reserving security for unpaid purchase price, are good between the parties in equity. But, all such are executory as to third parties, and fall both at law and in equity.

In all such cases, the maxim, that "equity regards that as done which ought to have been done," only supports the action when brought, and not before; else such equitable liens would be reared into legal ones, as from the beginning.

It is not the intention of the bankruptcy act, that, after proceedings in bankruptcy have been instituted, parties shall then take steps, either by action in courts or by taking possession of property or by recording unrecorded instruments, to perfect what would, up to that time, fail to be valid liens against creditors. Any so-called lien, which requires any such steps to be taken or any such act to be done, is not a lien of a character to be enforced in Illinois in bankruptcy proceedings. If there be an equitable lien upon equitable property or rights, it might be good against the trustee and good against an execution in some states; but under the law of Illinois, as repeatedly declared by its highest court, it is beyond controversy that conditional sales, unrecorded chattel mortgages, attempted pledges where there has been no delivery, are constructively fraudulent against creditors, and if a creditor can obtain a judgment and levy an execution or levy an attachment, or buy the property, however much notice he may have, he will cut off such claims. So, under the bankruptcy act, to allow parties to perfect their liens in such cases, by taking possession of undelivered property in case of pledges or by recording chattel mortgages, after the bankruptcy proceedings have begun, would be to allow them to obtain their legal liens in spite of the provisions of the bankruptcy act against illegal pretences, and in spite of the law and policy of the state against secret liens and constructive fraud. The trustee, on behalf of the general creditors, is entitled to invoke the law of Illinois to prevent the enforcement of these so-called claims of the petitioners and the storage company; and this is true, whatsoever might have been the rights directly between the petitioners, the storage company and the bankrupt.

But, the obtaining of liens against insolvent debtors through legal proceedings within four months of the bankruptcy, is to be deemed null and void, under the bankrupt act.

And the allowance now in the bankruptcy proceedings of such claims as require action in courts to create them liens would be for the bankrupt court in effect to give and support illegal preferences. Such alleged equitable claims must fall under such circumstances.

In re Richards, 96 Fed., 937.

Stelling v. *G. W. Jones Lumber Co.*, 116 Fed., 261.

In re Richards, 96 Fed., 937, and in *Stelling* v. *The G. W. Jones Lumber Co.*, 116 Fed., 261, sustain the contention that transfers, to be effectual, must be present, valid, subsisting transfers, and that the diligence of a creditor who would by legal proceedings perfect and maintain his lien, must have begun action before the bankruptcy proceedings were instituted, and, perhaps, not less than four months before such proceedings.

The First National Bank and H. W. Rogers & Brother received illegal preferences within the meaning of the bankrupt act. The bank received large payments in money. If the payments did not come from the seed in question, or that which had been involved under the warrants held by the bank, they were certainly illegal preferences. When the bankrupt removed a lot of seed, the security was at an end. Thenceforward the creditor had the right to recover a judgment against the bankrupt, but he had no property securing his loan. When subsequently a new warrant was given in place of a warrant for seed that had some time before been removed, it was the giving of a new security and an illegal

preference. This applies to both the bank and Rogers & Brother.

If the act perfecting a lien is independent of the original transaction, so that there is no present consideration, the lien, if created within four months, will fall under the provisions of Section 67. The lien in such cases is not potential from the time of the advance, but only from the changed conditions wrought by action or taking possession, which does not make the lien relate back. Distinction is here to be made with respect to mechanic's liens and the like, where, by the law, the lien is potential and the filing of a subsequent notice within a limited time is only to prevent lapse. But where the right respecting security is only contractual and personal between the parties, having been agreed upon with the loan or credit, but not perfected, it is not a present right *in re* or *ad rem*, and should the debtor refuse to deliver when called upon, nothing remains but for the creditor to bring action to compel performance; and in such cases no lien attaches until decree is obtained or the property is seized by a sufficient legal process, unless the bringing of suit is by the local laws notice of such character as to cut off rights of third parties. The taking of possession under all such cases, or the bringing of suit, creates a preference not allowed by the bankruptcy act, where other conditions specified in the act are found.

It was shown in the evidence in the present case that from under at least five of the thirteen warrants held by the First National Bank the lots of seed were removed, sold and shipped away by the bankrupt, and new lots of seed put in their place by him.

As to the five warrants held by Rogers & Brother, the seed had been substituted in the cases of, at least, three warrants.

There is indication that lots were substituted in a number of other of the eighteen warrants held by the bank and Rogers & Brother.

This portion of the evidence was very hard to produce, and the substitutions hard to trace, but, in the face of every objection and all opposition on the part of the bank, Rogers & Brother, and the storage company, the trustee, succeeded in bringing a good many facts to light. But the petitioners are demanding "equity." In equity and under circumstances such as are involved in this case, it is pointedly said, in the noted *Union Trust Company* case (p. 164), that the burden is on the claimants to make a clean breast of everything touching the transactions and property.

Estoppel does not apply where a certain and definite property is all taken away and other property substituted in its place. If one has a perfectly valid chattel mortgage, duly acknowledged and recorded, covering personal property, definite in description and location, and the mortgagor wrongfully takes the same away and substitutes other like property, estoppel will not protect the mortgagee.

In the case of *Snydaker* v. *Blatchley,* 177 Ill., 506, Blatchley, who was a public warehouseman, stored grain in an elevator of Class B and gave grain receipts to Snydacker. The receipt having in it, as the court said, words of conveyance, the transaction, being for security, was treated as a mortgage. Blatchley failed and assigned under the insolvency law of the state, and Snydacker claimed certain grain in the warehouse. The court said:

> "As between the parties it created a lawful lien [there being a conveyance] upon the grain covered

by the writing. *Whether such an instrument is good and effectual as against the assignee of an insolvent debtor need not be here considered, for the reason it was conclusively proven the wheat in the elevator when the mortgage was executed, and upon which it attached as between the parties, had been removed therefrom and disposed of by the debtor, prior to the assignment, and did not come to the hands of the assignee.* Had appellants held a mortgage acknowledged in strict conformity with the statute, it would have availed them nothing, for the reason the assignee had not the property to which it attached. *The instrument does not profess to operate upon any grain other than that then owned by Blatchley and then in his possession. Equitable interests in property subsequently acquired by a mortgagor are never declared, except where the intent to bind after acquired property is clearly expressed in the mortgage or writing relied upon to create the lien."*

The above portion of the decision is complete in its being one branch of the case before the court; the other portion of the case related to receipts for property which the parties held as owners.

It is difficult to see that there would be any different reasoning in the case of a pledge held as security from that with reference to a chattel mortgage, as stated in the Snydacker case.

Also the fact that the bankrupt in this case in the regular course of business frequently removed and sold certain lots of seed, and at later dates took up the old warrants and gave the bank and Rogers & Brother in exchange therefor new warrants for new lots, militates against the equities claimed. Whether the bank and Rogers & Brother acted in ignorance of the facts, does not relieve the case from running against the provisions of the bankruptcy act as to illegal preferences. And the

effect of protecting the bank and Rogers & Brother by so-called equitable liens and estoppels in this case, would be, in short, to encourage tendencies to fraudulent and questionable methods of business, such as took place in the bankrupt's business in this instance.

It may be that the petitioners here failed, in fact, to have the legal lien that they supposed they had. It is immaterial, under the bankruptcy act, and under the laws of Illinois, whether there was fraud in fact or whether they occupied innocently and the fraud was only fraud in law. If they acted in good faith, there is no question but that the First National Bank and Rogers & Brother, respectively, had their rights of action against the National Storage Company, because of the false warrants. It will appear that they should have no standing in equity, as they maintained by their petitions in the District Court and boldly maintain by their brief and argument in this court that the scheme carried on by the storage company was a legitimate one. They also now claim the scheme was well known to the commercial world and therefore must admit it was well known to them. We deny the existence of this general knowledge, but if petitioners claim it they should be estopped from claiming innocence of the infirmities of the scheme. They maintain that all that the storage company did was right, but undertake, in the same breath, to say to the court that, if the court stamps it as a fraud and a false pretence, then they wish to be protected in equity.

Furthermore, whatever the character of the alleged possession, the petitioners cannot deny actual knowledge of it. They were not in possession themselves. If the alleged possession of the torage company was for the

petitioners, it could be only on the theory that it was the agent of the holders of the so-called warrants, *i. e.*, the petitioners. If it was their agent, its knowledge of the invalidity of the lien and its knowledge of the fact that the actual possession of the seed was in Rogers, and not in itself, was their knowledge.

The Supreme Court, in the *Union Trust Co.* v. *Trumbull* case, in the latter part of the opinion states the real ground and the only ground for its conclusion and decision. It quotes the provision of the Voluntary Assignment Act of Illinois, showing that the assignee under that act takes title purely as a "volunteer" and subject to all the liens, equities and burdens to which it was subject in the hands of the assignor. The court then says:

> "The general rule is that an equitable lien is enforcible against voluntary assignees. * * * There is no mode under our law, except by chattel mortgage, duly acknowledged and recorded, by which the owner of personal property, retaining its possession, can give another a lien upon it that can be enforced against creditors and subsequent purchasers. But by 'creditors' is meant, not general creditors or creditors at large, but only such creditors as are armed with an execution or writ of attachment or other process of court, are regarded as 'creditors' in the sense that they are authorized to impeach a conveyance or transfer of property by their debtors, or question the validity of an equitable lien on personal property that is good as against such debtors themselves, and their heirs, executors, administrators and voluntary assignees."

As before shown, the bankruptcy act includes within its protection the very parties as general creditors that were excluded by this decision. Furthermore, we do not apprehend that it will be contended by any one that the trustee in bankruptcy is a pure volun-

teer. Under the Voluntary Assignment Act of Illinois, the debts of the assignor were not discharged. Under the Bankruptcy Act, they are. Under the Voluntary Assignment Act of Illinois the debtor could not be compelled to make an assignment. Under the Bankruptcy Act, he may be. And we take it that it is well known that most of the voluntary proceedings in bankruptcy are instituted by debtors to forestall involuntary proceedings that may be instituted against them.

V.

IF THE FORMAL APPEAL FROM THE DISTRICT COURT TO THE CIRCUIT COURT OF APPEALS BE TAKEN AS INFORMALLY A PETITION FOR REVIEW, THE DECISION OF THE CIRCUIT COURT OF APPEALS REACHED THEREIN WAS JUST AND PROPER, AND THE ONLY PROPER DECISION TO BE REACHED.

While respondents maintain with confidence that the circumstances of this case class it as an independent suit or a controversy in bankruptcy proceedings, and not as a mere proceeding in bankruptcy, they, nevertheless, present a few suggestions on the subject of petitions for review, and the taking of an appeal as informally a petition for review.

a. The point raised by petitioners is not one as to real jurisdiction, but as to matter of form and practice merely; and the case having been submitted in the Circuit Court of Appeals by all parties without objection, and there determined, petitioners are estopped and can not now present the point of practice.

b. The findings and report of the referee, approved by the District Court in its decree, were a part of the find-

ings of that court and characterized the possesion mentioned in the decree of the court, showing such possession to be no actual possession whatever, and such findings of the referee are a part of the findings certified to the Court of Appeals, and considered by it.

c. In such cases of informal petitions for review, by way of appeal, the Circuit Court of Appeals can consider the whole record, which has been certified up to it, and submitted by the parties without objection, as embodying the facts upon which the law is to be revised, and revise it accordingly.

It is at once obvious that there is no real question of want of jurisdiction raised, or attempted to be raised, by the petitioners, but that the point presented amounts to a mere question of practice. The "want of jurisdiction" alleged is not of that character that requires the proceedings to be dismissed whenever the point is made or noticed; for there is no question, in proceedings of this nature, of the ample jurisdiction of the Circuit Courts of Appeals over the subject-matter of review and revision of the decisions of the District Courts.

If this case in the District Court was a bankruptcy proceeding, from the decree in which a petition for revision, and not an appeal, was the proper method to obtain a review in the Circuit Court of Appeals (if there is such limitation to a petition for revision), yet, the case having been carried to the latter court by an appeal, and that court having full jurisdiction to review bankruptcy proceedings by petition or appeal, and the case having there been submitted by all parties without objection, it must now be concluded that the court itself, as well as the parties, waived all objections to the form in which the jurisdiction of that tribunal was invoked.

The jurisdictional requirement as to due notice set forth in the bankruptcy act having been satisfied in this case under the method pursued in taking the case to the Circuit Court of Appeals, as well as it would have been had the form used been that of a petition for review, and, especially, no objection having been raised at the hearing or before the decree in the Circuit Court of Appeals, the petitioners cannot now be heard to say that the mere matter of form and pleadings used in invoking the jurisdiction of the appellant tribunal was not waived by their thus submitting the case upon its merits to that tribunal, and that the court of appeals did not disregard the matter of form, and review the case as if brought before it by petition.

The very position of petitioners, that the Circuit Court of Appeals had jurisdiction to review had there been a petition for review instead of an appeal, concedes the contention that their objection goes only to the form in which the case came to that court.

Their objection, now made for the first time, being to a matter of form and not of substance, comes too late. They may properly be said to have joined in the errors assigned in the Court of Appeals, and must concede that all points raised were passed upon by the court with jurisdiction.

That the objection is upon a question of practice, and not want of jurisdiction, has the support of a number of the Circuit Courts of Appeals.

In re Richards, 96 Fed., 935 (7th Circuit).

In re Abraham, 93 Fed., 767 (5th Circuit).

Chesapeake Shoe Co. v. *Seldner,* 122 Fed., 593 (4th Circuit), (and see cases there cited).

The District Court in its decree approved and confirmed the *referee's report and findings therein,* except as to jurisdiction. (Rec., 114.) This made that report and the findings therein the findings of the District Court, and the finding in the decree as to the "possession" of the storage company must be taken in connection with and in view of the findings of the referee adopted by the court.

This report is found on pages 29 to 44 of the Record, and is in some of its essentials set out above under head II of this argument. The facts constituting the so-called possession as they actually were are there found, which show absolutely that there was no actual possession or control in the storage company. It is true the referee and the court drew from these findings of fact certain conclusions as to possession, which were mere conclusion of law; but the facts are there *found,* and were certified to the Circuit Court of Appeals, and that court must be taken to have revised the law thereon. The decision rendered by the Court of Appeals is not only justified by the record so limited, but was the only decision that could be reached.

Further, it may be well maintained that *where the whole evidence* that was before the District Court *is certified up* to the Circuit Court of Appeals under the form of an appeal, although only a petition for review would be the proper practice, *and is there submitted* to the court *without objection by the parties,* and especially where there is no conflict of evidence as to the material facts, the Court of Appeals can *revise the law of the whole case,* as on a petition, using the evidence as the statement of facts.

In re Richards, *supra.*

Treated as a petition for review, the decision of the court was just and proper, and is supported by other United States Courts.

Respectfully submitted.

JOSEPH E. PADEN and
NEWTON WYETH,
Counsel for Respondents, Chicago Title and Trust Company, Trustee, and James A. Patten.

REED, SMITH, SHAW & BEAL,
Of Counsel.